Karen Brinkmann
Direct Dial (202) 637-2262
e-mail: karen.brinkmann@lw.com

555 Eleventh Street, N.W., Suite 1000
Washington, D.C. 20004-1304
Tel: (202) 637-2200 Fax: (202) 637-2201
www.lw.com

LATHAM & WATKINS LLP

May 8, 2003

By Electronic Filing

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, D.C. 20554

Re: *Petition of ACS of Alaska, Inc., ACS of Fairbanks, Inc., and ACS of the Northland, Inc. to Amend Section 51.405 of the Commission's Rules to Implement the Eighth Circuit's Decision in Iowa Utilities Board v. FCC Regarding the Burden of Proof in Rural Exemption Cases Under Section 251(f)(1) of the Communications Act,* Order in CC Docket No. 96-98, DA 01-1951 (Com. Car. Bur., rel. Aug. 27, 2001), Petition for Reconsideration filed Sept. 26, 2001– Notice of *Ex Parte* Communication in CC Docket 96-98

Dear Secretary Dortch:

I had an *ex parte* contact yesterday with Lisa Zaina, Senior Legal Advisor to Commissioner Adelstein, on behalf of ACS of Alaska, Inc., ACS of Fairbanks, Inc., and ACS of the Northland, Inc.(collectively, "ACS"), the petitioners in the above-captioned proceeding.

I noted that ACS has been urging the FCC to adopt a new rule Section 51.405 since March 2001, and seeking reconsideration of the above-reference Bureau order since September 2001. I summarized ACS's position in this matter, as more fully described in ACS's Petition for Reconsideration, that the Bureau had erroneously denied ACS's petition to codify the national rule on burden of proof in rural exemption termination cases, as announced by the U.S. Court of Appeals for the Eighth Circuit in July 2000.

The Eighth Circuit (and now this Commission, in the Bureau order cited above) have articulated the unambiguous statutory requirement that the burden of proof be placed on the party seeking to terminate a LEC's rural exemption pursuant to Section 251(f)(1)(B) of the Communications Act. Yet, as this Commission is aware, the Regulatory Commission of Alaska ("RCA") has refused to embrace this rule, and indeed has argued that the Alaska courts should ignore it. (*See* Letter of Karen Brinkmann to Secretary Dortch in CC Docket 96-98, August 1, 2000.)

It now has come to ACS's attention that General Communication, Inc. ("GCI") is seeking a legislative amendment in Alaska which would shift the burden of proof in Section 251(f)(1)(B) cases to the rural incumbent LEC. In other words, despite the fact that GCI sought

review of the Eighth Circuit's ruling on this question in the U.S. Supreme Court, and that *certiorari* was denied, GCI now is trying to finagle the result it failed to obtain in federal court, in clear contravention of the Eighth Circuit's ruling. Astoundingly, in its explanation to the proposed amendment (enclosed), GCI shamelessly states, "FCC rules require the [RCA] to decide whether competition should be limited in rural areas, *but the FCC rules do not state* whether the incumbent carrier or the potential competitor should have the burden of proof." Neither the Eighth Circuit's ruling nor the Bureau's order is mentioned by GCI.

This Commission should not be dissuaded any longer from adopting a national rule which would bind all the states to consistently implement the statute as interpreted by the Eighth Circuit and affirmed by the Bureau. The FCC first adopted a rule governing burden of proof precisely because it found the termination of an incumbent carrier's rural exemption, and a consistent application of the burden of proof in such cases, to be *of national importance* to achieving the goals of the Act.

As ACS demonstrated in its Petition for Reconsideration and reply comments in this proceeding, the Alaska commission and courts have proven that the Eighth Circuit's opinion cannot by itself achieve national uniformity in the implementation of Section 251(f). The RCA has no intention of following the Eighth Circuit's ruling without FCC codification; and if GCI has its way, the state of Alaska will enact a contrary rule. FCC guidance therefore is both appropriate and necessary to ensure the goals of the Act are achieved.

It has been over 19 months since ACS filed its Petition for Reconsideration. ACS respectfully urges that the Commission act now to grant the Petition and put in place a new Section 51.405(a) codifying the Eighth Circuit's decision. The language ACS proposes mirrors the Eighth Circuit's ruling:

> (a) In a bona fide request for interconnection, services, or access to unbundled network elements, the burden of proof shall be on the requesting party to prove to the state commission that the rural telephone company is not entitled, pursuant to Section 251(f)(1) of the Act, to continued exemption from the requirements of Section 251(c) of the Act, including the burden of proving that the application of Section 251(c) as requested would not be unduly economically burdensome, is technically feasible, and is consistent with Section 254 of the Act (other than subsections (b)(7) and (c)(1)(D)).

ACS believes that this rule change fully and fairly embodies the Eighth Circuit's interpretation of Section 251(f)(1) of the Act.

Please direct any questions concerning this matter to me.

Very truly yours,

Karen Brinkmann
Counsel to ACS OF ALASKA, INC., ACS OF FAIRBANKS, INC., and ACS OF THE NORTHLAND, INC.

Enclosure

cc: Lisa Zaina, Office of Commissioner Adelstein
Christopher Libertelli, Office of Chairman Powell
Matthew Brill, Office of Commissioner Abernathy
Jordan Goldstein, Office of Commissioner Copps
Jessica Rosenworcel, Office of Commissioner Copps
Dan Gonzalez, Office of Commissioner Martin
William Maher, Chief, Wireline Competition Bureau
Michelle Carey, Chief, Competition Policy Division, Wireline Competition Bureau
Sonja Rifken, Office of General Counsel

4-14-05

GCI AMENDMENTS

Listed in order of priority

AS 42.05.900

(a) In any proceeding conducted by the commission pursuant to 47 USC 251(f)(1)(B), the incumbent local exchange carrier as defined by 47 USC 251(h)(1) shall have the burden to prove that the incumbent local exchange carrier should be entitled to continued exemption from the requirements of 47 USC 251(c).

* Subsection (b) provides that any rural incumbent local exchange carrier that seeks to limit local exchange competition shall have the burden of proof in any proceeding before the Commission. FCC rules require the Commission to decide whether competition should be limited in rural areas, but the FCC rules do not state whether the incumbent carrier or the potential competitor should have the burden of proof. Consistent with the public interest favoring competitive provision of local exchange service, the burden of proof would be placed on the party seeking to limit such competition.

(b) The legislature finds that competition in the provision of local exchange telephone service has promoted the public interest of the citizens of Alaska in those communities where such competition has been allowed and that such competition should be permitted to continue in those communities and expand to other communities.

* GCI proposes a legislative finding that competitive provision of local exchange service is in the public interest. This proposed finding is very similar to the finding of the Legislature in 1990 regarding long distance competition, which is set forth in statute at AS 42.05.800. Local exchange competition has already been introduced in Anchorage, Fairbanks, and Juneau. A substantial number of subscribers in each community have "voted with their dollars" by choosing a competitive local exchange provider that gives better service or better value. These benefits should be

allowed to spread to other communities in Alaska.

(c) No later than December 31, 2003, the Commission shall adopt rules for the calculation of intrastate access charges so the access charges paid by an interexchange carrier to a local exchange carrier for origination and termination of intrastate long distance calls is comparable to the access charges paid by an interexchange carrier to the local exchange carrier for origination and termination of interstate interexchange long distance calls.

* Subsection (c) requires the Commission to complete its pending proceeding on access charge reform. The reform is necessary in order to eliminate huge price differentials for the same services associated with interstate, intrastate, and cellular phone calls. The existing huge pricing differentials provide an artificial advantage to some market participants and encourage the unlawful arbitrage of intrastate long distance phone calls.